Aspen Leasing Systems, Inc. and W. H. Froh, Inc. *and* Local Union No. 339, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 7-CA-22000

10 September 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 27 March 1984 Administrative Law Judge Thomas D. Johnston issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] We agree with the judge, for the reasons he states, that the two Respondents do not constitute a single employer and are not alter egos of each other, even though there is a close relationship between the two companies. Although the judge treated the joint employer and single employer concepts interchangeably, the theories are distinct and the joint employer standard is inapplicable to the General Counsel's actual theory of violation and to the facts of this case. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge. This case was heard at Port Huron, Michigan, on October 20 and 21, 1983[1] pursuant to a charge filed on April 18 by Local Union No. 339, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Union) and a complaint issued on June 16.

The complaint as amended at the hearing alleges that Aspen Leasing Systems, Inc. (Respondent Aspen) and W. H. Froh, Inc. (Respondent Froh), constitute a single and/or joint employer and are alter egos of each other and Respondent Aspen and Respondent Froh (collectively the Respondents) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by permanently laying off all employees employed by Respondent Aspen in the bargaining unit represented by the Union and by Respondent Froh rehiring them as new employees doing the same work functions at the same site and under the same supervision as previously but with the loss of seniority and other benefits they previously enjoyed under the collective-bargaining agreement because the unit employees supported and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection and to discourage employees from engaging in such activities. It further alleges the Respondents violated Section 8(a)(1), (3), and (5) of the Act by refusing to bargain in good faith with the Union by repudiating the collective-bargaining agreement covering the unit employees and by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees in order to undermine the Union's status as the exclusive collective-bargaining representative of the unit employees.

The Respondents in their answer dated June 30 and as amended at the hearing deny having violated the Act as alleged and assert as affirmative defenses that the Union failed to exhaust the collective-bargaining agreement between the parties and the remedies available to it under the agreement and the case should be dismissed or deferred to arbitration; the Union failed to negotiate properly a closing agreement with Respondent Aspen and continues to fail to negotiate a closing agreement in violation of the Act; and the Union failed to exhaust available intraunion remedies, collective-bargaining agreement remedies, and other statutory remedies available to the Union and the case should be dismissed with all costs awarded to Respondent Froh.

The issues involved are whether Respondent Aspen and Respondent Froh constitute a single and/or joint employer or are alter egos of each other; whether the Respondents violated Section 8(a)(1), (3), and (5) of the Act as alleged by discriminatorily laying off Respondent Aspen's unit employees and rehiring them as new employees by Respondent Froh doing the same jobs but without the contractual benefits previously enjoyed because of their union or protected concerted activities, and unlawfully refused to bargain in good faith with the Union by repudiating the collective-bargaining agreement covering the unit employees and by refusing to recognize and bargain with the Union as the representative of the unit employees in order to undermine the Union as the exclusive representative of the unit employees; and whether the affirmative defenses raised by the Respondents have merit.

On the entire record in this case and from my observations of the witnesses and after due consideration of the oral argument made by the General Counsel[2] and the brief filed by the Respondents, I make the following[3]

[1] All dates referred to are in 1983 unless otherwise stated.

[2] The General Counsel did not submit a brief.

[3] Unless otherwise indicated the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record which I credit.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

Respondent Aspen, a Michigan corporation with its principal office and place of business located at Port Huron, Michigan, is engaged in the business of leasing, mechanical repair, and maintenance of trucking equipment. During the calendar year 1982, a representative period, Respondent Aspen in the course of its operations leased trucking equipment including tractors and trailers which leases were valued in excess of $50,000 to Respondent Froh.

Respondent Froh, a Michigan corporation with its principal office and place of business located at Port Huron, Michigan, and another facility located at New Haven, Michigan, is engaged in the business of general freight hauling. During the calendar year 1982, a representative period, Respondent Froh in the course of its operations derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Michigan directly to points located outside the State of Michigan.

Respondent Aspen and Respondent Froh are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local Union No. 339, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent Froh's Operations*

Respondent Froh, a Michigan corporation, with its principal office and place of business located at 2121 Petit Street, Port Huron, Michigan (the Port Huron Terminal), which is the only facility involved in this proceeding, and another facility located at New Haven, Michigan (the New Haven Terminal) is engaged in business under the authority of the Interstate Commerce Commission and the Michigan Public Service Commission as a contract carrier for the New Haven Foundry and operates as an irregular route common carrier hauling various types of commodities such as fish, meats, candy, foundry parts, dry goods, canned goods, and castings in approximately 15 to 20 of the 48 States in the United States in which it has operating authority. Included among its customers are Shedd's Food Products, New Haven Foundry, Leaf Candy, Jervis B. Webb Company, Sarah Lee, Murco Meats, and Vlasic Pickles.

Respondent Froh is owned by William Neely, Fred Schriever, Charles Rackas Jr., and Paul Cosper who each own a 25-percent interest in the corporation. The board of directors, which holds separate meetings limited to the corporation, is comprised of George Neely Sr., William Neely, Fred Schriever, Paul Cosper, Charles Rackas Jr., and David Whitlack. The management and supervisory personnel, except for the accounting functions which are under Controller Michael Kovsky, include President William Neely[4] General Manager Michael Neely, Operation Manager Jim Powell and Dispatchers Suanne O'Boyle and Sady Sanchez. Controller Kovsky supervises the clerical employees.

The New Haven Terminal, which has been in existence for approximately 55 years, provides trucking services for the New Haven Foundry. It employs truckdrivers and one mechanic who maintains and repairs the tractors and trailers operating out of that terminal. According to General Manager Neely once in a great while the mechanic would be brought to the Port Huron Terminal to work on Respondent Froh's tractors and trailers.

The truckdrivers at the New Haven Terminal are represented by Local Union No. 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America while the mechanic has never been represented by any labor organization.

Respondent Froh began operations at the Port Huron Terminal about 1980 when Aurelio Trucking Company ceased operations. This facility is a 2-story building owned by Transport Docking, a Michigan partnership, and it has a garage area and office space and a fenced in yard where tractors and trailers are kept. The truckdrivers employed by Respondent Froh at this terminal are represented by the Union with which it has had collective-bargaining agreements covering them. The latest agreement, which contained automatic renewal provisions, was effective by its terms from October 1, 1980, to and including December 31. President Neely negotiated these collective-bargaining agreements and General Manager Neely handled the day-to-day labor relations including grievances. These truckdrivers drove trucks owned by or leased to Respondent Froh.[5]

Respondent Froh has its own offices, sales force, clerical staff, accounting and billing department, dispatchers, telephone number,[6] insurance coverage, pension plan, bank accounts, business colors, issues its own invoices and accounting statements, files tax returns for which it has its own identification numbers, and advertises in its own name. Its name also appears separately over the door to its separate office entrance at the Port Huron Terminal as well as on the doors of the tractors and on the sides of the trailers it owns or leases.

The above findings are based on the undisputed testimony of President Neely, General Manager Neely, and Controller Kovsky, which I credit.

B. *Respondent Aspen's Operations*

Respondent Aspen, a Michigan corporation with its principal office and place of business also located at 2121 Petit Street, Port Huron, Michigan, was engaged in the

[4] The other corporate officers besides the president were not identified.

[5] The registrations carried in the tractors and trailers show, as required by the Interstate Commerce Commission, both the owner and lessee if the tractor or trailer is leased.

[6] The switchboard is operated by Respondent Froh's receptionist who also handles calls for both Respondent Froh and Respondent Aspen which had its own separate telephone number. Although on occasions the receptionist would answer the telephone using the names of both Respondents together, she was not supposed to do so.

business of leasing tractors and trailers and the mechanical repair and maintenance of trucking equipment. It began operations in 1978 to meet the equipment needs of Aurelio Trucking Company and it ceased operations about March 11 due to a lack of customers and a downturn in the economy. Among Respondent Aspen's customers to whom it leased equipment including tractors and trailers were Aurelio Trucking Company, Big D Cartage, Beaver Lumber Company, John A. Byer Lumber Company, Riverside Metal Products, Durnay Landscaping, Earl Smith Distributors, Diamond Crystal Salt Incorporated, Diamond Crystal Transportation, and Respondent Froh.[7] These leases also provided for the maintenance and repair work on the tractors and trailers leased to be performed by Respondent Aspen. Respondent Aspen would order parts in its own name for customers except for parts used on Respondent Froh's own trucks for which it would order them in Respondent Froh's name and then bill Respondent Froh.

Respondent Aspen, which provided 24-hour a day road service 7 days a week, also belonged to the National Leasing Service which is an affiliation of leasing companies throughout the United States that offers repair service at discounts to members whose equipment breaks down on the road and also provides them with fuel at no markup. It also belonged to the Mack Truck Service Dealership which was an authorized service center to handle warranty or other repairs on Mack trucks.

The original owners of Respondent Aspen were William Neely, Fred Schriever, Paul Cosper, Charles Rackas Jr., and William Coble[8] who each owned 20 percent of the stock in the corporation. About the latter part of 1982 Respondent Froh became the owner of all the stock except the 20 percent owned by Coble who still owns his stock.

The board of directors, which held separate meetings limited to that corporation, was comprised of William Neely, Fred Schriever, Paul Cosper, Charles Rackas Jr., David Whitlock, and William Coble.

The management and supervisory personnel included President William Neely[9] and General Manager Michael Neely. Michael Grube was previously employed as maintenance manager.

Respondent Aspen, which previously employed its own salesmen, only employed three full-time mechanics at the time it ceased operations. These mechanics provided their own personal tools for use in their work except for items such as air-compressors, floor jacks, and an A-frame hoist, which were provided for them. These machanics, who maintained and serviced equipment leased by Respondent Aspen, were represented by the Union which Respondent Aspen had voluntarily recognized and had had collective-bargaining agreements covering them. The latest collective-bargaining agreement, which contained automatic renewal provisions, was effective by its terms from September 1, 1981, to and including December 31. Article I, section 2 of that agreement, which is the recognition clause, only refers to employees and does not set out the job classifications covered. However, the job classifications set out under the wage section on schedule A lists the classifications of leadman, journeyman-mechanic, apprentice, helper, and utility. No reference is made in the collective-bargaining agreement to regular part-time employees, none of whom were employed by Respondent Aspen, who the General Counsel contends contrary to Respondent Aspen's position, should be included in the appropriate unit description. Since the collective-bargaining agreement did not specifically include regular part-time employees and none were employed by Respondent Aspen and absent as here any showing that the failure to include regular part-time employees in the unit contravenes the Act or established Board policy, I find they are not included in the appropriate bargaining unit.[10]

President Neely negotiated the collective-bargaining agreements for Respondent Aspen and General Manager Neely handled the day-to-day labor relations of Respondent Aspen's employees. Respondent Aspen's employees worked in the garage area of the Port Huron Terminal building which it leased from Transport Docking.[11] It had its name on a sign[12] located on top of the building over the garage entrance and its name also appeared on the tractors and trailers it leased. Restroom facilities located in the garage area were used by employees of both Respondent Aspen and Respondent Froh, however, Respondent Froh's employees had their own restrooms.

Respondent Aspen had its own bank account, accounting and billing system, business colors, telephone number, insurance coverage, pension plan, issued its own invoices and accounting statements, filed tax returns for which it had its own identification numbers, and advertised in its own name.

Prior to March 11 Respondent Froh using its own employees under the supervision of Controller Kovsky did provide certain accounting and bookkeeping functions for Respondent Aspen. They did the billing, accounts payable, bookkeeping and computer work, and certain management functions were also performed by President Neely, General Manager Neely, and Controller Kovsky for Respondent Aspen. Respondent Froh for performing these clerical and management services was paid a management fee of approximately $3000 a month by Respondent Aspen.

Respondent Froh and Respondent Aspen also shared the costs of utilities on the Port Huron Terminal.

[7] Prior to March Respondent Aspen leased 40 to 50 pieces of equipment including tractors and more than twice as many trailers to Respondent Froh which was its largest customer.

[8] Coble is the owner of a leasing company and Coble Express, a trucking company which is a competitor of Respondent Froh.

[9] The other corporate officers besides the president were not identified.

[10] Agreements between parties on the appropriateness of the unit have long been accepted by the Board which gives them broad latitude in reaching such agreements that will not be disturbed absent a showing that exclusion or inclusion of certain employees contravenes the Act or established Board policy. *Teamsters Local 912 (Harvey Russell)*, 145 NLRB 1486, 1488 (1964).

[11] Transport Docking is no longer charging Respondent Aspen rent on the property and Respondent Froh is not paying rent to Respondent Aspen.

[12] Plans had been made to have the sign removed.

Respondent Aspen did not employ any truckdrivers or dispatchers or operate any trucks. It did not possess any authorization from the Interstate Commerce Commission or the Michigan Public Service Commission to operate trucks and could not legally haul freight and was never a trucking company.

The above findings are based on the undisputed testimony of President Neely, General Manager Neely, and Controller Kovsky, which I credit.

C. *The Layoff of Respondent Aspen's Unit Employees*

Respondent Aspen purchased 27 Mack tractors from Mack Truck which were financed through Mack Financial. These tractors, which had been leased by Respondent Aspen to Respondent Froh, were repossessed and returned to Mack Financial about the fall or later part of 1982. Mack Financial subsequently sued Respondent Aspen for over $200,000 for the deficiency in payment for this equipment.

The repossession of these tractors, which Respondent Froh had been leasing and operating, resulted in the layoff of 17 truckdrivers out of the approximately 27 to 35 truckdrivers employed by Respondent Froh at the Port Huron Terminal. Respondent Froh then subcontracted that work to owner-operator truckdrivers, who were not in the unit, and who furnished their own equipment which they maintained themselves. This resulted in a grievance being filed over the layoff of the truckdrivers.

Bill Milletics, who worked for Respondent Aspen as a diesel mechanic on general repair work, also filed a grievance alleging he had been improperly laid off work under the seniority clause of the collective-bargaining agreement and claimed Bernie Mouillseaux should have been laid off instead. This layoff occurred about October 1982. Respondent Aspen contended Mouillseaux was the first employee hired and had the most seniority while the Union's position was he should have been fourth down on the list.

Thomas Drechsler, who is the Union's business agent and trustee, testified that while discussing these two grievances with President Neely about December 1982 in the presence of General Manager Neely and Controller Kovsky, Neely informed them if the Union would resolve the Milletics grievance by letting them change the seniority system so Milletics would be at the top of the seniority list and that when they dissolved Respondent Aspen they would keep the mechanics then employed by Respondent Froh in the unit. Drechsler, who claimed this was the first he heard about Respondent Aspen ceasing its operations, rejected the offer by informing Neely he was not offering him any thing the law did not provide for the people anyway. Drechsler also stated in subsequent meetings that President Neely also said they intended to dissolve Respondent Aspen and indicated he would keep the mechanics in the unit and bring them into Respondent Froh but said they wanted to resolve the Milletics grievance.

Both the collective-bargaining agreements between the Union and Respondents Aspen and Froh contained grievance and arbitration provisions. However, the grievance procedure for Respondent Froh unlike that of Respondent Aspen, provided for an alternative procedure whereby the parties had the right to mutually agree to utilize the Michigan Joint State Committee in lieu of certain other portions of the arbitration procedures.

Business Agent Drechsler testified that on January 5 a meeting was held by the Michigan Joint State Committee on both Respondent Froh truckdrivers layoff grievance and Respondent Aspen Milletics grievance. Drechsler represented the Union and President Neely and Controller Kovsky represented Respondent Froh and Respondent Aspen. After these grievances were discussed separately the committee's decision was for the parties to take both grievances back to the local level and resolve them.

Subsequently, Drechsler stated he had a couple of meetings with Respondent Froh and Respondent Aspen concerning these grievances. According to Drechsler Respondent Froh made a cash offer to settle the truckdrivers layoff grievance and on January 24 President Neely stated he would offer $1500 to Milletics to resolve Respondent Aspen's Milletics grievance, then dissolve Respondent Aspen and keep the people in the Union and change the seniority rotation of the people. Drechsler's response was Neely was not offering him any thing the law did not provide for as far as a successor or alter ego company, to which Neely made no response. After rejecting the proposal on the Milletics grievance Drechsler stated he redocketed it with the Michigan State Joint Committee. Drechsler denied there were any further discussions regarding the cessation of Respondent Aspen's operations prior to March.

President Neely acknowledged meetings were held with the Union in late 1982 and in January to try to settle the grievances relating to the layoff of the truckdrivers of Respondent Froh and the use of independent contractors resulting from the repossession of the tractors and that at one of the meetings there was also a discussion of the grievance involving Respondent Aspen filed by Milletics. President Neely admitted that Respondent Froh offered to settle the truckdrivers layoff grievance by paying $1500 to each of the alleged grievants. However, this offer was rejected by the truckdrivers. President Neely further admitted that about January or February he made a proposal to the Union to settle the Milletics grievance by proposing that the Union recognize seniority the way Respondent Aspen saw it and when Respondent Aspen ceased operations Respondent Aspen's mechanics would be hired by Respondent Froh as mechanics and after being hired Respondent Froh would recognize the Union as the representative of then Respondent Froh's mechanics which would enter into a collective-bargaining agreement with the Union covering them. He denied making any cash offer to settle the Milletics grievance. Neely agreed the Union did not accept the proposal and further claimed that although it was suggested to Drechsler that he take the proposal back to the men, Drechsler never did.

President Neely denied that the Union's refusal to accept the proposal was the reason Respondent Froh did not recognize the Union as the bargaining representative of Respondent Froh's mechanics who had previously

worked for Respondent Aspen and were hired after it ceased operations. Instead he testified he withdrew his offer to recognize the Union because Business Agent Drechsler never followed up on it by talking to the employees and giving him an answer and in effect had rejected his offer.

The grievances pertaining to Respondent Froh's layoff of the truckdrivers and to Respondent Aspen's Milletics grievance were still pending arbitration at the time of the hearing held in October.

On Friday, March 11, President Neely, General Manager Neely, and Controller Kovsky held a meeting with all of Respondent Aspen's unit employees, who were mechanics Bernie Mouillseaux, James Green, and Donald Lock.

Green testified they were given layoff notices[13] and informed by President Neely that Respondent Aspen would no longer exist and mentioned just the maintenance portion and explained that the reasons were that the economy and because of the repossession of some of their equipment. Neely also gave them applications for being hired at Respondent Froh starting March 14 after their layoff if they wanted to. He also mentioned there would be no union at Respondent Froh as there was with Respondent Aspen but stated they could reorganize if they were inclined to do so and they could have a vote if they wanted to. General Manager Neely and Controller Kovsky explained the Blue-Cross-Blue Shield major medical program at Respondent Froh.

President Neely acknowledged explaining to the three mechanics that at the end of that week Respondent Aspen would no longer be maintaining equipment and would no longer need Respondent Aspen's mechanics and that Respondent Froh was taking over all of their own maintenance and would need approximately two mechanics. The three mechanics were then given their layoff notices and told they would like to have them consider coming to work for Respondent Froh. They were also given applications and President Neely indicated Respondent Froh ever since its inception had been a nonunion shop and at that point it was going to remain that way but stressed the fact that if they desired to organize that was strictly up to them. The benefits at Respondent Froh were also discussed with the mechanics.

Controller Kovsky corroborated President Neely's testimony stating that President Neely, pursuant to questions by Green, indicated that Respondent Froh did not have a mechanic's union and Respondent Aspen would not be operating and the Union would not carry over to Respondent Froh but if they wanted to organize at Respondent Froh it was strictly up them.

To the extent the testimony of President Neely and Controller Kovsky may conflict with that of James Green, I credit Neely and Kovsky rather than Green. Apart from my observations of the witnesses, Green's testimony was contradictory.

Green, who denied ever working for Respondent Froh before, testified that on March 12 he filled out an application to work for Respondent Froh and on Monday, March 14, Bernie Mouillseaux, Donald Lock, and himself began working as mechanics at Respondent Froh. Green described the work at Respondent Froh, who paid them, was the same as the work they had performed at Respondent Aspen. They used the same tools, worked out of the same garage at the Port Huron Terminal, used the same pickup truck which Respondent Aspen had used as a service truck, worked on the same tractors and trailers, and General Manager Neely was over them. Green did state that on one occasion, however, he worked 5 days as a mechanic at Respondent Froh's New Haven Terminal while the mechanic there was on vacation.

General Manager Neely acknowledged the mechanics worked on the same tractors and trailers as at Respondent Aspen and they continued to do the same type work at Respondent Froh.

All three of these mechanics had worked full time at Respondent Aspen. While Mouillseaux and Green also worked full time at Respondent Froh, Lock only worked part-time at Respondent Froh from March 14 until September when he began working full time. Although these mechanics at Respondent Froh continued to receive the same hourly rate of pay they had received while working at Respondent Aspen they were hired as new employees and their benefits, including vacations, holidays, major medical coverage, and retirement plan, were different than those benefits they had received at Respondent Aspen. General Manager Neely described these benefits besides pay were the same as those enjoyed by the Respondent Froh's unrepresented clerical employees.

D. *Alleged Refusal to Bargain with the Union*

Business Agent Drechsler testified he first learned about the layoff of Respondent Aspen's mechanics, the fact Respondent Aspen was being dissolved, and the March 11 meeting on March 18 from James Green and that a couple of days later he received in the mail copies of the mechanics' layoff notices.

Drechsler notified President Neely by letter dated April 5 listing both the names of Respondent Froh and Respondent Aspen that he had heard Respondent Aspen's mechanics had been laid off but employed by Respondent Froh at the same address and doing the same work on the same equipment. The letter stated the Union was demanding the same contract be recognized by Respondent Froh and the same working conditions and benefits continue for those employees whether under Respondent Froh or Respondent Aspen.

President Neely responded by letter dated April 13 rejecting the Union's demands and pointed out that in January and February Drechsler was informed[14] Respondent Aspen was winding down its business affairs and that on or before March 14 it would no longer own any

[13] These notices dated March 11 and addressed to each of the three mechanics stated as follows: "Effective the end of your assigned shift the week ending *March 12, 1983* you are hereby laid off permanently and definitely due to lack of work."

[14] Drechsler acknowledged having a conversation with President Neely in February concerning Respondent Aspen ceasing operations but stated he could not recall exactly what occurred.

equipment or leases that required it to have mechanics on its payroll. The letter further mentioned that during the same period there were outstanding grievances against Respondent Aspen and Drechsler had been told in order to settle those grievances Respondent Froh would hire those employees who had worked for Respondent Aspen and enter into a collective-bargaining agreement and maintain Respondent Aspen's seniority list. However, Respondent Froh had since learned Drechsler never told the employees of Respondent Aspen about the offer or allowed them to vote on it. The letter further asserted Respondent Froh and Respondent Aspen were two separate legal entities recognized by all of their creditors and the secretary of the State of Michigan; that Respondent Froh was not a party to any existing contract between the Union and Respondent Aspen; and any persons who became Respondent Froh's employees were not subject to any contract between Respondent Aspen and the Union.

On April 25, Drechsler by letter to President Neely requested recognition as the exclusive bargaining agent for Respondent Froh's mechanics and indicated the letter was not to disregard the Union's April 5 letter demanding recognition of Respondent Aspen's contract.

Respondent Froh did not recognize the Union as the bargaining representative of its mechanics or follow Respondent Aspen's collective-bargaining agreement with the Union covering them.

Respondent Aspen ceased operations about March 11 following a board of directors' decision in March to stop maintaining equipment and operating the garage. Since that time Respondent Froh, which also owns other tractors and trailers, has purchased certain tractors and trailers from and continues to lease certain tractors and trailers from Respondent Aspen which owns them and it pays Respondent Aspen for their use. However, these are nonmaintenance leases because Respondent Froh provides its own maintenance. Respondent Aspen no longer provides maintenance or repair service to anyone and except for the equipment leased to Respondent Froh it has no other customers and does not do business with any other company. Respondent Aspen is paying off its creditors at the rate of 15 to 30 cents on each dollar of indebtedness.

Respondent Froh now has seven tractors it operates and employs five truckdrivers not counting the owner-operator tractors it still operates and it has about 30 to 40 trailers available for its use.

Respondent Froh has never leased tractors or trailers and does not perform maintenance work for other employers. While mechanic James Green stated that since he has been employed by Respondent Froh he has serviced special units, which are one unit with a box on the back instead of being a tractor and trailer used by Riverside Metal Products and Durnay Landscaping which he also serviced while employed by Respondent Aspen, the dates or circumstances of these occasions were not identified and Green also stated the tractors and trailers he currently services are owned by Respondent Froh. President Neely, whom I credit, denied Respondent Froh now does any repair work on any equipment owned by other companies.

Respondent Froh does not belong to and is not eligible to belong to the National Leasing System since it is not a leasing company and it does not belong to the Mack Truck Service Dealership. It also does not have a 24-hour-a-day road service or distribute fuel.

E. *Analysis and Conclusions*

The General Counsel contends Respondent Aspen and Respondent Froh[15] constitute a single and/or joint employer and are alter egos of each other and violated Section 8(a)(1), (3), and (5) of the Act by discriminatorily laying off Respondent Aspen's unit employees and rehiring them as new employees by Respondent Froh doing the same jobs but without the collective-bargaining agreement benefits previously enjoyed by them because of their union or protected concerted activity, and unlawfully refused to bargain in good faith with the Union by repudiating the collective-bargaining agreement covering the unit employees and by refusing to recognize and bargain with the Union as the representative of the unit employees in order to undermine the Union's status as the exclusive representative of the unit employees. The Respondents deny having violated the Act and assert certain affirmative defenses.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(a)(3) of the Act provides in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Section 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the representative of its employees.

The initial issues to be resolved are whether Respondent Aspen and Respondent Froh constitute a single and/or joint employer or are alter egos of each other.

The principal factors relied on in determining whether two enterprises constitute a single employer are the interrelationship of operations, centralized control of labor relations, common management, common ownership or financial control. *Sakrete of Northern California*, 137 NLRB 1220, 1222 (1962), enfd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). The existence of an alter ego status between two enterprises is determined by their having common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market"; the nature and extent of negotiations and formalities surrounding the transaction; and whether the purpose behind the creation of the alleged alter ego was legitimate or whether instead its purpose was to evade responsibilities under the Act. *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

[15] Although the General Counsel further contended at the hearing that at the very least Respondent Froh was a successor to Respondent Aspen, the amended complaint did not allege it was a successor.

The above findings establish Respondent Froh and Respondent Aspen are separate corporations. While there is between them certain common as well as different ownership of the stock of the two corporations, the same members of the board of directors with two exceptions, and the same persons, attributable in part to a management fee arrangement, managed both corporations and handled labor relations and provided certain clerical, bookkeeping, and recordkeeping functions for each corporation separately, each corporation performed separate and distinct business functions which were not interrelated with each other and served different customers. Respondent Froh operating under both Federal and state authority was a trucking company whereas Respondent Aspen, which had no legal authority to operate as a trucking company, was a leasing company that leased trucks and trailers and maintained and repaired the equipment it leased. Except for the fact Respondent Froh was also one of Respondent Aspen's customers there was no other relationship between them other than those described above. Following the termination of Respondent Aspen's operations for economic reasons, Respondent Froh did not take over the leasing or maintenance and repair of leased equipment previously performed by Respondent Aspen. It did purchase from and continued to lease as it previously had certain equipment from Respondent Aspen which it reimbursed Respondent Aspen for and hired the mechanics who had previously worked at Respondent Aspen as its own employees to perform the maintenance and repair work required on Respondent Froh's own tractors and trailers including those it leased and operated itself. Maintaining and repairing its own equipment was not new to Respondent Froh who for many years had employed a mechanic at its other terminal to perform such work and on rare occasions prior to closing Respondent Aspen's operations that mechanic had also performed some of the work at the Port Huron Terminal. Thus, while certain factors for consideration in finding a single and/or joint employer or alter ego status are present, I am persuaded and find based on the overall evidence referred to, particularly that which shows Respondent Froh and Respondent Aspen are separate corporations with some difference in ownership performing separate, distinct, and unrelated business operations and the fact Respondent Froh did not assume Respondent Aspen's leasing operations when it ceased operations but merely hired three of Respondent Aspen's former employees as its own employees, that Respondent Froh and Respondent Aspen do not constitute a single or joint employer and are not alter egos of each other.

With respect to the refusal of Respondent Froh and Respondent Aspen to recognize and bargain in good faith with the Union as the representative of the unit employees and repudiating the collective-bargaining agreement covering them, since the evidence establishes Respondent Froh and Respondent Aspen are not a single or joint employer or alter egos of each other and Respondent Froh did not assume or succeed to Respondent Aspen's business operations when it ceased operations there was no legal obligation imposed on Respondent Froh to voluntarily recognize and bargain with the Union as the representative of the mechanics in the bargaining unit it hired who had previously worked for Respondent Aspen or to assume the obligations under Respondent Aspen's collective-bargaining agreement with the Union. For these reasons I find neither Respondent Froh nor Respondent Aspen violated Section 8(a)(1), (3), and (5) of the Act by refusing to recognize and bargain with the Union or by repudiating the collective-bargaining agreement as alleged.

The next issue to be decided is whether Respondent Aspen or Respondent Froh discriminatorily laid off all the unit employees and rehired them as new employees of Respondent Froh doing the same work but without the benefits they previously enjoyed under the collective-bargaining agreement because of their union or protected concerted activities.

The law is well settled that an employer violates Section 8(a)(1) of the Act by discriminating against employees because of their protected concerted activities and violates Section 8(a)(3) of the Act by discriminating against employees because of their union activities. The filing of a grievance by an employee under a collective-bargaining agreement is protected and for an employer to discriminate against the employee for filing such grievance violates Section 8(a)(3) and (1) of the Act. *John Sexton & Co.*, 217 NLRB 80 (1975).

The General Counsel argues that Respondent Aspen and Respondent Froh discriminatorily laid off the unit employees at Respondent Aspen and rehired them as new employees at Respondent Froh doing the same jobs but without the benefits they previously enjoyed under the collective-bargaining agreement because of the grievances filed, namely, the grievance involving the layoff of truckdrivers by Respondent Froh and the Milletics grievance against Respondent Aspen. To support his argument that the layoffs were unlawful the General Counsel relies on the fact Respondent Froh refused to recognize the Union as the bargaining representative of the unit employees hired from Respondent Aspen or to follow their collective-bargaining agreement as President Neely had originally proposed to do in part to settle the Milletics grievance, which refusal the General Counsel asserts was done in retaliation for the Union's failure to agree to such proposal.

Since the Union itself had previously rejected President Neely's proposals to settle these grievances, which were still pending arbitation at the time of the hearing, and absent as here any legal obligation imposed on Respondent Froh to recognize the Union as the bargaining representative of the mechanics it hired who previously worked for Respondent Aspen or to assume the collective-bargaining agreement covering them, I find the General Counsel's position is untenable and no basis exists for finding that the layoff of the unit employees by Respondent Aspen or rehiring them as new employees by Respondent Froh but without the benefits of the collective-bargaining agreement was because of their union or protected concerted activities as alleged. Accordingly, I find that Respondent Aspen and Respondent Froh did not violate Section 8(a)(1) and (3) of the Act by laying off the unit employees and hiring them as new employees at

Respondent Froh but without the benefits of the collective-bargaining agreement because of their union or protected concerted activities as alleged.

The remaining issue relates to the affirmative defenses raised by the Respondents. Since the collective-bargaining agreements between Respondent Froh and Respondent Aspen and the Union do not contain provisions for resolving whether the Respondents constitute a single and/or joint employer or are alter egos[16] of each other upon which the alleged violations are all premised, deferral to arbitration would not be appropriate and there is no requirement before seeking recourse under the Act for the Union to first exhaust the collective-bargaining agreement or available intraunion remedies or to negotiate a closing agreement with Respondent Aspen. Further, the Respondents' request that costs be awarded to Respondent Froh is rejected since no basis exists for awarding such costs.

CONCLUSIONS OF LAW

1. Aspen Leasing Systems, Inc. and W. H. Froh, Inc. are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 339, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Aspen and Respondent Froh do not constitute a single and/or joint employer and are not alter egos of each other.

4. Respondent Aspen and Respondent Froh did not discriminatorily lay off Respondent Aspen's unit employees and rehire them as new employees of Respondent Froh doing the same jobs but without the collective-bargaining benefits they previously enjoyed because of their union or protected concerted activities or unlawfully refuse to bargain in good faith with the Union by repudiating the collective-bargaining agreement covering the unit employees and by refusing to recognize and bargain with the Union as the representative of the unit employees in violation of Section 8(a)(1), (3), and (5) of the Act, as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The amended complaint is dismissed in its entirety.

[16] The provisions of the collective-bargaining agreement are limited under art. II, sec. 1 to accretions to the unit.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.